IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

THOMAS PAGANI, Plaintiff, v. MODUS EDISCOVERY, INC. f/k/a IVIZE SERVICES, INC., and ABTIN BUERGARI a/k/a ABTIN AKBARI a/k/a ABTIN ABKARI, Defendants.	))))))))))))	Civil Action No. 3:16-CV-00024 Judge Graham Mullen

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Modus eDiscovery, Inc. ("Modus") and Abtin Buergari ("Buergari"; collectively, "Defendants"), respectfully move, pursuant to Rule 56(a), that this Court grant summary judgment on all counts in Plaintiff Thomas Pagani's ("Pagani" or "Plaintiff") Amended Complaint because there is no genuine dispute as to any material fact and Defendants are entitled to judgment as a matter of law.

INTRODUCTION

Action Legal Document Services of Charlotte, LLC ("ALD") hired Plaintiff on January 3, 2006 and entered into the Employment Agreement. (Doc. 8, ¶ 9; Doc. 9, ¶ 9.) In December 2010, having purchased the assets of ALD, Defendant Modus eDiscovery, Inc. ("Modus") (formerly known as "Ivize Services, Inc." ("Ivize")) assumed responsibility for Plaintiff's Employment Agreement. (Doc. 8, ¶¶ 13-16; Doc. 9, ¶¶ 13-16.)

Modus terminated Pagani's employment on December 12, 2012. (Doc. 8, ¶ 23; Doc. 9, ¶ 23.) At that time, Pagani was a Regional Discovery Executive at Modus, with profit and loss responsibility for Modus's Charlotte, North Carolina operations. (Doc. 8, ¶¶ 17-18, Schmidt Decl. ¶ 3, Exh. A at ¶ 9(d).)

The key point in this case is that Modus rightfully terminated Plaintiff for failure to meet specified sales goals and because of losses in his operations. Under Paragraph 9 of his Employment Agreement, Modus could terminate Plaintiff's employment with or without "Cause." (Schmidt Decl. ¶ 3, Exh. A at ¶ 9.) The Employment Agreement defines "Cause" as "Tier 1 Cause," "Tier 2 Cause," "Tier 3 Cause," or "Tier 4 Cause." (Schmidt Decl. ¶ 3, Exh. A at ¶ 9(d).) If Modus terminated Pagani, while possessing Tier 1 or Tier 2 Cause, Pagani would not be entitled to any severance. (Schmidt Decl. ¶ 3, Exh. A at ¶ 9 (c).) Both of these tiers are also defined within the Employment Agreement. (Schmidt Decl. ¶ 3, Exh. A at ¶ 9(d).) In relevant part, Tier 2 Cause requires that the Net Sales from the Charlotte operations be below certain amounts in either a six-month ($397,475.50) or 12-month ($753,315) period, and that the business in Charlotte had losses for the same period. (*Id*.) According to Modus's Profit & Loss report for the Charlotte office for the relevant periods, these conditions were met, providing Tier 2 Cause for termination. (*See* Schmidt Decl. ¶ 4, Exh. B.)

On December 12, 2012, Modus terminated Pagani's employment, when Net Sales failed to meet the specified targets and the Charlotte office operated at a loss for both the six-month period and 12-month period prior to the date of Pagani's termination. (Doc. 8, ¶ 23; Doc. 9, ¶ 23; Buergari Decl. ¶ 8; Schmidt Decl. ¶ 4, Exh. B.) As a result, Plaintiff is not entitled to any severance. (*See* Schmidt Decl. ¶ 3, Exh. A at ¶ 9(c)-(d).) Plaintiff also is not owed any earned commissions. (Schmidt Decl., ¶ 9.) Therefore, Plaintiff's breach of contract claim must fail.

Plaintiff's claim for unjust enrichment also fails because Plaintiff has admitted the existence of a valid, enforceable agreement between himself and Modus. (*See* Doc. 8, ¶¶ 9, 48-49.) In light of this, Plaintiff's claim for unjust enrichment cannot be maintained under North Carolina law. Finally, the Employment Agreement is between Modus and Pagani. Buergari is not a party to the contract, Plaintiff's attempt to pierce the corporate veil is absolutely meritless and, thus, Buergari cannot be held personally-responsible for any alleged breach of the Employment Agreement and he must therefore be dismissed from this case in any event.

For these reasons, as described in more detail below, this Court should grant Defendants' Motion for Summary Judgment and dismiss the Amended Complaint as to all claims and parties with prejudice.

LEGAL STANDARD

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Lyles v. K Mart Corp.*, 703 F. Supp. 435, 438 (W.D.N.C. 1989). "A fact is 'material' if it might affect the outcome of the case. A 'genuine dispute' exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Flexible Foam Products, Inc. v. Vitafoam Inc.*, 980 F. Supp. 2d 690, 696 (W.D.N.C. 2013) (internal quotations and citations omitted). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; Rule 56 requires that there be no genuine issue of material fact." *Lyles*, 703 F. Supp. at 438 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50.

ARGUMENT

I. PAGANI WAS TERMINATED FOR "TIER 2 CAUSE," IS OWED NO COMMISSIONS AND IS THEREFORE ENTITLED TO NO DAMAGES

Over three years ago, Modus terminated Plaintiff's employment for "Tier 2 Cause," as defined in the Employment Agreement and described below. Plaintiff is therefore not entitled to any severance payments, which means that Modus did not breach the contract by not paying severance to Plaintiff. All the criteria for "Tier 2 Cause" existed when Modus terminated Plaintiff's employment. (Buergari Decl., ¶ 8.) Because Plaintiff's employment was terminated for "Tier 2 Cause," the Employment Agreement states that Plaintiff is not entitled to any severance payments. Thus, Modus has complied with its contractual obligations and Plaintiff's claim for breach of contract for failure to pay severance must fail.

Plaintiff claims that he is entitled to severance payments and other damages resulting from Defendants' alleged breach of contract because his employment was terminated without "Cause" as that term is defined in the Employment Agreement between Modus and Pagani. (Doc. 8, ¶¶ 47-57.) Plaintiff specifically alleges that his employment was not terminated for "Tier 2 Cause" and that his employment was terminated without cause. (Doc. 8, ¶¶ 26, 29.) Plaintiff ignores the clear language of the Employment Agreement he signed which allowed termination for "Cause" based on the Charlotte operations' losses and Net Sales below established benchmarks, and Modus did in fact terminate his employment because of the Charlotte operations' losses and poor Net Sales. (Schmidt Decl., ¶ 3, Exh. A at ¶ 9(c) and (d)(i); Buergari Decl., ¶ 8.) This provided "Tier 2 Cause," as that term is defined in the Employment

Agreement. Specifically, "Cause" is defined as "Tier 1 Cause, Tier 2 Cause, Tier 3 Cause and/or Tier 4 Cause." (Schmidt Decl. ¶ 3, Exh. A at ¶ 9(d)(i).) "Tier 2 Cause" is defined as:

> (x)(a) the Net Sales from the Company's operations, during the most recent six calendar months ended at least 20 days prior to the date as of which Tier 2 Cause is to be determined, were less than $397,475.50 . . . or (b) the Net Sales from the Company's operations, during the most recent twelve calendar months ended at least 20 days prior to the date as of which Tier 2 Cause is to be determined, were less than $753,315 . . . and (y) the Company had losses (determined in accordance with generally accepted accounting principles) for such six calendar month period or twelve calendar month period, as applicable.

(*Id.*) The Employment Agreement defines the "Company" as Action Legal Document Services of Charlotte, LLC. (*Id.* at 1.) Modus terminated Plaintiff's employment on December 12, 2012. (Doc. 8, ¶ 23; Doc. 9 ¶ 23.) Modus's Profit & Loss spreadsheet covering January 2006 through December 2012 plainly demonstrates that Modus had losses in Charlotte for at least the 12 months preceding Plaintiff's termination, meeting the (y) requirement for Tier 2 Cause. (Schmidt Decl. ¶¶ 4 & 5, Exh. B.) In fact, Modus had losses in Charlotte every month dating back to June 2011, and losses in most months dating back to at least July 2009. (*Id.*)

The Profit & Loss spreadsheet also makes abundantly clear that the (x) requirement for Tier 2 Cause was also met at the time Plaintiff's employment was terminated, whether a six-month or 12-month period is used. (*Id.*) Given the Employment Agreement's requirement that the period must end at least 20 days before the date Cause is determined, the relevant six-month period would be from May 2012 through October 2012. The Net Sales for this period total only $368,211.15; the Employment Agreement requires only that Net Sales be below $397,475.50 for Tier 2 Cause in a six-month period. (Schmidt Decl. ¶¶ 3, 4 & 6, Exhs. A at ¶ 9(d)(i) & B.) Similarly, the relevant 12-month period would be from November 2011 through October 2012. The Net Sales for this period total only $629,871.99, well below the Employment Agreement's requirement of Net Sales less than $753,315 for Tier 2 Cause in a 12-month period. (Schmidt

Decl. ¶¶ 3, 4 & 7, Exhs. A at ¶ 9(d)(i) & B.) Thus, all the criteria for Tier 2 Cause existed and, contrary to Plaintiff's allegations, Modus properly terminated Plaintiff's employment for Tier 2 Cause. (Buergari Decl., ¶ 8.)

According to the Employment Agreement, if Pagani were terminated for Tier 2 Cause, he "shall not be entitled to any severance." (Schmidt Decl. ¶ 3, Exh. A at ¶ 9(c).) Because Modus terminated Pagani for Tier 2 Cause, he is not entitled to any severance. Because Pagani is not entitled to any severance, Modus has not breached the contract. Plaintiff claims that Modus has never informed him that he was terminated for Tier 2 Cause or any other Cause pursuant to the Employment Agreement. (Doc. 8, ¶ 43.) However, the Employment Agreement's "Termination of Employment" section does not contain any notice requirement; in fact, nothing in the Employment Agreement requires Modus to inform Pagani that his termination is for Cause. (*See* Schmidt Decl. ¶ 3, Exh. A at ¶ 9.) Thus, this case is distinguishable from *Smith v. E & E Co., Ltd.*, No. 12-00018, 2014 WL 1119926 at *2 (W.D.N.C. March 20, 2014). In *Smith*, the contract required written notice for a termination for cause shown to be effective. *See id.* Here, there is no such contractual requirement.

The elements for a breach of contract claim in North Carolina are "(1) existence of a valid contract and (2) breach of the terms of that contract." *Jones v. Penn Nat. Ins. Co.*, 835 F. Supp. 2d 89, 99 (W.D.N.C. 2011) (citation omitted). In *Jones*, the plaintiff claimed breach of contract based on the defendant insurance carrier's refusal to attempt settlement before exhaustion of the tortfeasor's liability coverage. *See id.* The court found that the contractual duty to pay the insured "does not arise before the point of liability coverage exhaustion. Because this claim alleges breach of a contractual duty that had not yet come into existence . . . this claim . . . fails as a matter of law." *Id.* Here, Modus acknowledges the existence of a valid contract between it and Plaintiff. However, Modus had no duty to pay any severance to Plaintiff if Modus terminated Plaintiff's employment for Tier 2 Cause. Because Plaintiff's employment was, in fact, terminated for Tier 2 Cause, Plaintiff has alleged breach of a contractual duty that has never come into existence. Modus terminated Plaintiff's employment for Tier 2 Cause. Plaintiff is not entitled to any severance payments. Thus, Modus has not breached the Employment Agreement by failing to pay severance.

Plaintiff additionally claims that Modus owes him earned commissions. (Doc. 8, ¶ 55.) Modus has no record of any outstanding commissions that have not been paid to Plaintiff, nor has Plaintiff provided any details regarding these purported "earned commissions." (Schmidt Decl., ¶ 9.) Therefore, Plaintiff cannot succeed on his breach of contract claim to the extent it seeks damages for failure to pay commissions. As Plaintiff has failed to show an entitlement to severance or commissions, this Court should grant summary judgment in favor of Defendants on Plaintiff's First Cause of Action.

II. PAGANI'S UNJUST ENRICHMENT CLAIM IS BARRED BY THE WRITTEN EMPLOYMENT AGREEMENT

Under North Carolina law, "a claim for unjust enrichment may not be brought in the face of an express contractual relationship between the parties." *Madison River Management Co. v. Business Management Software Corp.*, 351 F. Supp. 2d 436, 446 (M.D.N.C. 2005) (citing *Southeastern Shelter Corp. v. BTU, Inc.*, 572 S.E.2d 200, 206 (N.C. Ct. App. 2002). "If there is a contract between the parties, the contract governs the claim and the law will not imply a contract." *Southeastern Shelter*, 572 S.E.2d at 206. In *Southeastern Shelter*, even though the plaintiffs failed to assert a claim for breach of contract, the fact that a contract existed between the parties precluded the plaintiffs from claiming unjust enrichment. *Id*. at 206-07. In *Madison River*, because the plaintiff had pleaded facts alleging the express contract, the plaintiff was barred from claiming the existence of an implied contract and the court dismissed the plaintiff's claim for unjust enrichment. *Madison River*, 351 F. Supp. 2d at 446.

Here, Pagani alleges the Employment Agreement is a valid, enforceable contract between Modus and Pagani. (Doc. 8 at ¶¶ 48-50, 59.) Modus does not dispute the validity of the contract. Thus, under North Carolina law, Plaintiff's claim for unjust enrichment cannot be maintained and this Court should grant summary judgment on Plaintiff's Second Cause of Action in favor of Defendants.

III. PAGANI'S ALTER EGO THEORY IS MERITLESS

For the reasons discussed above, Defendants should be granted summary judgment on both Plaintiff's breach of contract and unjust enrichment claims. In any event, Plaintiff's claims that Buergari should be held jointly and severally liable for both the First and Second Cause of Action are absolutely meritless and the claims against Buergari should be dismissed with prejudice. Buergari is not a party to the Employment Agreement. As such, he is not a proper party to this suit. Despite this, Plaintiff has alleged that Buergari, the former CEO of Modus, is the "alter ego" of Modus and should be held jointly and severally liable for Plaintiff's breach of contract and unjust enrichment claims. (Doc. 8 at ¶¶ 4, 57, 64.) This claim has no merit whatsoever.

"[W]here a corporation is managed in a way that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person." *GAVCO, Inc. v. Chem-Trend Inc.*, 81 F. Supp. 2d 633, 643 (W.D.N.C. 1999) (internal quotations and citations omitted) (emphasis added). In determining whether a corporation is a "mere instrumentality," North Carolina courts "examine three areas . . . (1) the domination and control of the corporate entity; (2) the use of that domination and control to perpetrate a fraud or wrong; and (3) the proximate causation of the wrong complained of by the domination and control." *Id*. (citations omitted). "The alter ego theory has been predominantly applied in North Carolina when determining whether the sole or dominant shareholder of a corporation will be liable for activities of the corporation in violation of the declared public policy or statute of the State." *U.S. v. Greer*, 383 F. Supp. 2d 861, 866 (W.D.N.C. 2005) (emphasis added). Alter ego cases apply the same three elements as "mere instrumentality" cases. *See id*. at 866-67.

North Carolina courts consider the following factors in determining "whether sufficient control and domination is present to satisfy the first prong of the three-pronged rule known as the instrumentality rule":

(1) inadequate capitalization;

(2) non-compliance with corporate formalities;

(3) complete domination and control of the corporation so that it has no independent identity;

(4) excessive fragmentation of a single enterprise into separate corporations;

(5) non-payment of dividends;

(6) insolvency of the debtor corporation;

(7) siphoning of funds by the dominant shareholder;

(8) non-functioning of other officers or directors; and

(9) absence of corporate records.

Glenn v. Wagner, 329 S.E.2d 326, 330-31 & 332 (N.C. 1985). Furthermore, "[c]ontrol [is] not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." *Greer*, 383 F. Supp. 2d at 867 (citing *Glenn*, 329 S.E.2d at 330).

As a preliminary matter, Buergari is—and was at all times relevant to the Amended Complaint—a *minority shareholder* of Modus. (Buergari Decl. ¶¶ 2 & 3.) Additionally, Azalea Capital ("Azalea"), an outside investor, acquired Modus on March 6, 2012 and has been the majority shareholder since that time. (Buergari Decl. ¶ 4.) Although Buergari is—and was—on the Board of Directors, Modus has five directors, three of whom were selected by Azalea. (Buergari Decl. ¶ 5; Schmidt Decl. ¶ 8.) Modus observed corporate formalities; the Secretary of Modus is Patrick Weston, and Modus's Board of Directors held meetings and has minutes of those meetings. (Buergari Decl. ¶ 6; Schmidt Decl. ¶ 8.) Modus and Buergari have separate bank accounts, and Buergari has never siphoned funds from Modus. (Buergari Decl. ¶ 7.) For all of these reasons, Plaintiff has entirely failed to satisfy even the first prong of the "instrumentality rule."

"Plaintiff's complaint does not contain any allegations relating either to the elements of piercing the corporate veil or to the factors courts consider when deciding whether to pierce the corporate veil." *Sivita USA, Inc. v. Stutts*, 663 S.E.2d 13 (Table), 2008 WL 2736610 at *5 (N.C. Ct. App. July 15, 2008). Instead, Plaintiff has merely made conclusory statements that Buergari is the "alter ego" of Modus. As such, Plaintiff has failed to state a claim against Buergari in his individual capacity and this Court should grant summary judgment in favor of Buergari. *See id.* at *6; *see also Richmond v. Indalex Inc.*, 308 F. Supp. 2d 648, 657 (M.D.N.C. 2004) (holding that where a plaintiff failed to sufficiently allege that the defendant corporation had no separate mind, will or existence of its own or was a sham corporation, the plaintiff had failed to allege any of the prongs of the "instrumentality rule").

It is worth noting, however, that Pagani has not alleged the perpetration of any fraud or wrong to satisfy the second prong of the "instrumentality rule." *See Indalex*, 308 F. Supp. 2d at 659. In *Indalex*, the court examined both Delaware and North Carolina law regarding piercing the corporate veil, and found that the plaintiff's allegations failed under both. *See id*. The *Indalex* court stated that to meet the second prong, "the alleged fraud or inequity must be distinct from the tort alleged in the complaint. . . . Any breach of contract and any tort . . . is, in some sense, an injustice. . . . The underlying cause of action does not supply the necessary fraud or injustice. To hold otherwise would render the fraud or injustice element meaningless, and would sanction bootstrapping." *Id*. (internal quotations and citations omitted) (emphasis added). Pagani has not alleged any fraud or wrong other than the breach of contract or, in the alternative, unjust enrichment. He has thus utterly failed to allege any fraud or wrongdoing distinct from his underlying claim, and therefore cannot satisfy the second prong of the "instrumentality rule."

Plaintiff's Employment Agreement is between him and Modus; Buergari is not a party to the Employment Agreement. Buergari is a minority shareholder, not the sole or dominant shareholder, of Modus. Modus is a solvent corporation, with a Board of Directors that performs its functions. Modus complies with corporate formalities and keeps corporate records. (Buergari Decl. ¶ 6; Schmidt Decl. ¶ 8.) Modus terminated Plaintiff for Tier 2 Cause and did not perpetrate any fraud or wrong. Plaintiff's bare allegations regarding Buergari serving as Modus's "alter ego" are plainly false and Plaintiff has utterly failed to demonstrate or even allege any facts to support a veil-piercing theory. As such, this claim is entirely frivolous. For these reasons, summary judgment should be granted in favor of Buergari for both Plaintiff's First and Second Causes of Action and, under any circumstances, Mr. Buergari should be dismissed from this action.

CONCLUSION

For the foregoing reasons, Defendants request that the Court grant summary judgment in their favor on all Counts in Plaintiff's Amended Complaint.

Respectfully submitted,

Dated: April 7, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2016, I caused to be served a copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** and all attachments thereto using the Court's ECF system, which will automatically send notice of the filing to the following:

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